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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 167

STUYVESANT TOWN CORPORATION, A CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 19–28) is reported at 111 F. Supp. 243.

JURISDICTION

The judgment of the Court of Claims was entered April 7, 1953. (R. 19, 40.) The petition for a writ of certiorari was filed July 6, 1953, and was served September 11, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether "income debenture certificates" issued by the taxpayer corporation to an insurance com-

pany, its parent, evidencing long-term investment loans made to it by the parent, are subject to the stamp tax imposed by Sections 1800 and 1801 of the Internal Revenue Code "on all bonds, debentures, or certificates of indebtedness issued by any corporation."

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 1800. IMPOSITION OF TAX.

There shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in sections 1801 to 1807, inclusive, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, the several taxes specified in such sections.

(26 U. S. C. 1946 ed., Sec. 1800.)

SEC. 1801 [As amended by Section 1 of the Revenue Act of 1939, c. 247, 53 Stat. 862; Section 209 of the Revenue Act of 1940, c. 419, 54 Stat. 516; and Section 521 (a) (3) of the Revenue Act of 1941, c. 412, 55 Stat. 687]. CORPORATE SECURITIES.

On all bonds, debentures, or certificates of indebtedness issued by any corporation, and all instruments, however termed, issued by any corporation with interest coupons or in registered form, known gen-

erally as corporate securities, on each $100 of face value or fraction thereof, 11 cents: * * *

(26 U. S. C. 1946 ed., Sec. 1801.)

Treasury Regulations 71 (1941 ed.), promulgated under the Internal Revenue Code:

SEC. 113.50. *Scope of Tax.*—Section 1801 imposes a tax upon the issue by any corporation of bonds, debentures, certificates of indebtedness, and all instruments, however termed, with interest coupons or in registered form and known generally as corporate securities. Every renewal of the above described instruments is taxable as a new issue.

SEC. 113.55. *Issues Subject to Tax.*—Ordinarily, a corporate instrument styled a bond, debenture, or certificate of indebtedness is subject to the tax. However, the taxability of an instrument is not determined by the name alone but depends upon all the circumstances, such as the name, form, and terms of the instrument, etc. Hence, an instrument, however designated, having all the essential characteristics of a bond, debenture, or certificate of indebtedness is taxable as such. Similarly, an instrument issued with interest coupons, or with provision for registration, and coming within the class known generally as corporate securities will be held subject to the tax regardless of the name by which it may be called.

* * * * *

STATEMENT

The facts, as found by the court below (R. 28–40), may be summarized as follows:

The taxpayer corporation was organized in 1943 as a wholly owned subsidiary of the Metropolitan Life Insurance Company (Metropolitan), pursuant to provisions of the Redevelopment Companies Law of New York,[1] for the purpose of rehabilitating substandard areas in New York City. Its authorized capital stock was ten shares of the par value of one hundred dollars each, in addition to which it was authorized to issue "income debenture certificates." (R. 28–29.)

On June 1, 1943, shortly after taxpayer's organization, the taxpayer, Metropolitan, and the City of New York entered into an agreement providing for the redevelopment by taxpayer of a substandard area in Manhattan and the erection thereon of apartment buildings, the project to be known as Stuyvesant Town. Title to the area was to be acquired by the City for the taxpayer, at the latter's cost. (R. 29–30.) The agreement specified in detail the respective rights and obligations of the parties. (R. 30–36.) It provided that taxpayer's "capital structure" should consist of not more than ten shares of stock of the par value of one hundred dollars each and limited to

[1] Chapter 2 of Title 11 of the Unconsolidated Laws of New York (Sections 3401–3426), enacted by Chapter 845 of the Laws of 1942, as amended by Chapter 234 of the Laws of 1943.

cumulative dividends of four and one-half percent, and of "income debenture certificates" in an amount equal to that part of the total final cost of the project which exceeded the par value of the stock (R. 30); that the debentures should mature January 1, 1984, bear four and one-half percent cumulative interest, and be amortized in designated amounts (R. 30–32); that Metropolitan should from time to time provide taxpayer with the necessary capital for the project, in exchange for taxpayer's debentures (R. 34); that Metropolitan should own all of the stock and debentures and, during the period of municipal tax exemption, should not transfer any of the stock or debentures without the City's consent (R. 34). The property devoted to the project was to be exempt from local taxes for a period of twenty-five years from completion of the project (R. 33), except that taxpayer might after five years from completion terminate the exemption upon specified terms (R. 35).

Taxpayer completed the project on July 1, 1949. During the progress of the work and in conformity with the agreement of June 1, 1943, Metropolitan loaned to taxpayer on forty-nine different dates varying amounts, each loan being evidenced by a "4½% Income Debenture Certificate." The certificates were identical in form, the only differences being the face amount, date of issuance, and the certificate number. They were on plain white paper, did not bear the seal

of the corporation, were not in registered form, and did not have interest coupons attached. On the back was space for the notation of amortization payments. (R. 36–37.) Metropolitan had the right to exchange any debenture certificate for others of equal amount but of different denominations. (R. 32, 37.) The debenture certificates were not in the form and of the character of those usually handled by brokers and investment concerns and known generally as bonds, debentures, certificates of indebtedness, or corporate securities. While the latter are assignable and usually negotiable, taxpayer's debentures were non-negotiable and could be assigned only in accordance with the terms of the agreement. (R. 38–39.)

The officers and directors of taxpayer are, with the exception of one who is the manager of the project, also officers and directors of the parent, Metropolitan. The common officers and directors are paid entirely by Metropolitan. Taxpayer has various employees of its own at the project, who are paid by it. (R. 37–38.)

As money was needed by taxpayer to carry out the project, the manager would advise taxpayer's secretary, who also was the general counsel of Metropolitan. The latter then requisitioned the certificate book which was kept in Metropolitan's vault, prepared the debenture certificate in the amount of funds required, requested Metropolitan's comptroller to draw a check for the amount,

and authorized the drawing of a check for the documentary stamps attributable to the issuance of the certificate. Thereupon taxpayer delivered to Metropolitan the executed debenture in exchange for Metropolitan's check, which was deposited in taxpayer's bank account. This procedure was followed in issuing each of the forty-nine certificates here involved. (R. 38.)

Prior to the issuance of any of the certificates, Metropolitan by letter requested a ruling as to whether they would be subject to stamp tax under Section 1801 of the Internal Revenue Code. The Commissioner ruled that they were taxable under that section "on either of two bases, that is as a debenture or as a certificate of indebtedness." Taxpayer paid sums aggregating $110,321.20 for documentary stamps which were affixed to the debenture certificates, and thereafter filed a claim for refund. The Commissioner rejected the claim (R. 39–40) and the Court of Claims upheld the Commissioner's determination. (R. 19–28, 40.)

ARGUMENT

1. The question here is substantially the same factual one which was presented in *General Motors Acceptance Corp.* v. *Higgins*, 161 F. 2d 593 (C. A. 2), certiorari denied, 332 U. S. 810, and the decision below is in accord with the decision in that case. See also *Commercial Credit Co.* v. *Hofferbert*, 93 F. Supp. 562 (D. Md.), affirmed *per curiam*, 188 F. 2d 574 (C. A. 4). Noth-

ing has occurred since the denial of certiorari in the *General Motors* case which would appear to warrant the granting of certiorari in this case, and there is no more occasion for further review of this case than of that one. Indeed, taxpayer here advances essentially the same arguments in support of its petition as were there offered.

2. The decision below is correct. Section 1800 of the Internal Revenue Code (*supra*, p. 2) provides generally for a documentary stamp tax. By Section 1801 (*supra*, pp. 2–3), the tax is imposed upon the issuance "by any corporation" of securities falling within either of two comprehensive groups: (1) "all bonds, debentures, or certificates of indebtedness"; or (2) "all instruments, however termed, * * * with interest coupons or in registered form, known generally as corporate securities." The legislative history of these provisions shows, as the court below pointed out (R. 24–25), that these two broad categories are separate and cumulative, and that to come within the first the instrument need not be known generally as a corporate security. See also *General Motors Acceptance Corp.* v. *Higgins*, 161 F. 2d at 596–597.[2] This construction is confirmed by the Treas-

[2] In 1926, the Court of Appeals for the Seventh Circuit reached a contrary conclusion in *Wilkinson* v. *Mutual Bldg. & Sav. Assn.*, 13 F. 2d 997. Not only has that decision never been followed by any other court of appeals, but in *Belden Mfg. Co.* v. *Jarecki*, 192 F. 2d 211, that court deprived the decision of any vitality in that circuit. For in the *Belden Mfg. Co.* case (involving the taxability of a corporate instru-

ury Regulations applicable since 1941 [Treasury Regulations 71, Secs. 113.50, 113.55 (1941 ed.) (*supra,* p. 3)], which must be deemed to have received implied legislative approval by virtue of the many subsequent amendments of other provisions of the Code without any change in the language of Section 1801, which it interprets.[3] See *Lykes* v. *United States,* 343 U. S. 118, 127.

The court below held (R. 28), as the Commissioner had ruled (R. 39–40), that the instruments here involved are subject to the stamp tax either as "debentures" or as "certificates of indebtedness." Neither the statute nor the Regulations attempt to prescribe an inflexible formula for

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ment under Section 1801), the court agreed with the Collector there that "whether [the instrument] is a *debenture subject to tax* or a note not liable for such tax, cannot be determined merely from the name or label which the parties have applied to the instrument." (Italics added.) 192 F. 2d at 212. Inasmuch as the instrument there was not "known generally as a corporate security," the court necessarily assumed that instruments which were not corporate securities could be taxed under Section 1801. Indeed, the court expressly stated that "The question for decision is dependent upon the particular facts of the case." (*Ibid.*)

[3] The Regulations provide that the tax applies to "bonds, debentures, certificates of indebtedness, *and* all instruments, however termed, with interest coupons or in registered form and known generally as corporate securities" (Section 113.50); and that an instrument having all the "essential characteristics of a bond, debenture, or certificate of indebtedness is taxable *as such*," while one with interest coupons or in registered form and "coming within the class known generally as corporate securities" will be "*similarly*" taxed (Section 113.55). (Italics supplied.)

applying those terms in all situations. Whether an instrument is a debenture or certificate of indebtedness within the meaning of Section 1801 necessarily "depends upon all the circumstances, such as the name, form, and terms of the instrument, etc." Section 113.55 of Treasury Regulations 71 (1941 ed.). As generally understood and as used in the taxing statute, the term "debenture" embraces any corporate instrument evidencing a long-term investment loan, as distinguished from a short-term commercial loan which is usually evidenced by a promissory note. *General Motors Acceptance Corp.* v. *Higgins, supra; Commercial Credit Co.* v. *Hofferbert, supra.* Cf. *United States* v. *Ely & Walker Dry Goods Co.*, 201 F. 2d 584 (C. A. 8).

The undisputed facts of this case fully justify the trial court's conclusion that the instruments here in question "were intended to, and did, represent a long-term investment" in taxpayer corporation (R. 26–27), and that their "terms and purposes * * * combine to put them well within the class of investment securities which Congress intended to tax" (R. 28). The securities were issued by a wholly owned subsidiary (taxpayer) to its parent (Metropolitan), an insurance company, and were described by the parties as "income debenture certificates." They evidenced loans totaling over one hundred million dollars, which constituted substantially the entire capital

of the subsidiary, its only other capital consisting of a nominal amount (one thousand dollars) evidenced by stock certificates. The "debenture certificates" were issued exclusively to the parent, as were the stock certificates, and their transferability was restricted. They represented long-term obligations payable in 1984, bore four and one-half percent cumulative interest, and were amortizable in designated amounts. The loans which they evidenced were made for the purpose of financing a City-sponsored housing project, which the subsidiary had been organized to carry on. And the certificates were issued pursuant and subject to a tripartite agreement among the subsidiary, the parent, and the City, which imposed numerous restrictions upon the borrower-subsidiary for the protection of the lender-parent and the City. In these circumstances, the trial court's conclusion that the instruments in question constituted either "debentures" or "certificates of indebtedness" cannot be said to be clearly erroneous—especially since the parties themselves characterized the instruments as "debenture certificates." Here, as in the *General Motors* case (161 F. 2d at 596), the "terms, appearance, and method of sale to a comparatively few investors who were required to state at least their then present intention to hold them [so-called notes] for investment purposes without transfer to others combined to put them in a

class apart from ordinary commercial promissory notes and into the category of debentures as that term is used in the statute." See also *Commercial Credit Co.* v. *Hofferbert, supra.*[4]

3. The decision below is not in direct conflict with the decision of any other court. Since the applicability of the statute "depends upon all the circumstances" (Section 113.55 of Regulations 71), neither the presence nor the absence of any particular factor is controlling. Cf. *John Kelley Co.* v. *Commissioner,* 326 U. S. 521. As was stated in *United States* v. *Ely & Walker Dry Goods Co., supra,* p. 588—the most recent case with which taxpayer asserts conflict (Pet. 9, 19–22)—"When it is kept in mind that the taxability of an instrument depends on the substance of the transaction of which it is a part, any supposed conflict between [cases relied upon by taxpayer and the Government] disappears." And similar statements are to be found in others of the claimed conflicting decisions. See *Belden Mfg. Co.* v. *Jarecki,* 192 F. 2d 211, 214 (C. A. 7); *Dauphin Deposit Trust Co.* v. *United States,* 80 F. 2d 893, 896 (C. A. 3). Recognizing that each case in this field has turned upon its own facts, the Government has refrained from applying for writs of certiorari in those decided adversely to it.

[4] The *Commercial Credit* case involved a loan by an insurance company, represented by a "promissory note," and the court followed the rationale of the *General Motors* decision. The instant case would seem to present an *a fortiori* situation, for here the loan was represented by "debenture certificates."

Moreover, the factual distinctions among these cases may be readily perceived. Thus, the "notes" in *Ely & Walker* (see Pet. 9, 19–21) were different from those involved in *General Motors* and *Commercial Credit* and from those in question here, inasmuch as they were "given in ordinary commercial banking transactions" and were "not sold for investment purposes." 201 F. 2d at 589. *Belden Mfg. Co.* (see Pet. 9, 19–21, 24) involved a promissory note,[5] which represented a bank loan made in the ordinary course of the bank's lending business rather than an investment by the bank. 192 F. 2d at 213. In *Dauphin Deposit Trust* (see Pet. 8, 14–17), the instruments were certificates evidencing part interests in a mortgage owned by a trust company, falling within the provision of the then applicable Treasury Regulations which exempted from

[5] So, too, were the instruments involved in *Allen* v. *Atlanta Metallic Casket Co.*, 197 F. 2d 460 (C. A. 5) (see Pet. 9, 19–21), and in *Bellefield Co.* v. *Heiner*, 25 F. 2d 560 (C. A. 3) (see Pet. 9, 10, 17). Thus, in *Atlanta Metallic Casket*, the Fifth Circuit, noting (197 F. 2d at 461) that taxability was "shrouded in, doubt," sustained the trial court's conclusion that a promissory note evidencing an ordinary commercial loan was not taxable as a debenture. In the *Bellefield Co.* case, the question for decision was (25 F. 2d at 561) whether "ordinary short-term promissory notes" given in exchange for bank loans were bonds within the meaning of the stamp tax provisions of the 1924 Revenue Act and the then applicable Treasury Regulations. Here, of course, no short-term bank loans are involved, nor is the question presented the same.

the tax an "instrument which merely represents an assignment of interest in a bond accompanying a mortgage." 80 F. 2d at 895–896. Finally, in *Wilkinson* v. *Mutual Bldg. & Sav. Ass'n, supra,* p. 8 n. 2 (Pet. 8, 10, 11, 14–16), the question was whether an instrument evidencing a loan by a building and loan association to its member was subject to the stamp tax imposed by the 1921 Act on "promissory notes," or to the larger tax imposed on "debentures" and other corporate securities. The court held that the instrument was taxable as a note, on the theory (13 F. 2d at 998) that it was taken in the ordinary and daily course of the association's lending business. The decision below, involving a long-term investment loan by an insurance company, is in no way inconsistent with that holding. (See also *supra,* p. 8 n. 2.)

In sum, there is no direct conflict of decisions on this essentially factual question. Each of the cited cases rests upon facts peculiar to it. If any factual comparison is to be drawn between this and other cases, it seems clear that the instant case bears a closer resemblance to *General Motors Acceptance Corp.* and *Commercial Credit,* in both of which taxes upon similar instruments were upheld, than to those upon which the taxpayer relies.

CONCLUSION

The decision below is correct. There is no direct conflict of decisions, and no occasion for review by this Court. The case turns on its own facts. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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